90-831

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1990

JERRY P. CAWLEY, Petitioner

-vs-

STEVEN MULLER, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Michigan Supreme Court

Submitted By:

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state courts' holding below incorrectly construes and applies the U.S. Congress's two express statutory exceptions to valid 17 USC 301(a) U.S. Copyright Act preemption--(1) the 17 USC 301(b)(1) exception to preemption whenever the claimed state right at issue arises OUTSIDE the 17 USC 501, 28 USC 1338(a) exclusive subject matter jurisdictional ambit of the Copyright Act delimited by 17 USC 102, 103; and/or (2) the 17 USC 301(b)(3) exception to preemption whenever the claimed state right at issue is NOT equivalent to any of the expressly ennumerated statutory 17 USC 106 rights exclusively regulated by the U.S. Copyright Act--in diamissing for lack of constitutionally valid sub-

ject matter jurisdiction due to 17 USC 301(a) U.S. Copyright Act preemption the following nine (9) common law and/or statutory State of Michigan law claims for relief--all of which, but for preemption, were suitable (if not proven) for routine state adjudication on merits:

1) the Count 1 non-performance of co-authors' unitary 17 USC 201(a) agreement accepting commission to subsequently create a copyright as to ownership rights, licenses, authorship attribution credit line rights, labor fees and costs fees, et cetera;

2) the Count 2 non-performance of a rather standard publications/marketing agreement consented to prior to the creation of any copyrights;

3) the Count 3 breach of a commiss-

ioning contract derived state covenant duty not to compete with the U.S. N.S.F./ M.F.O.A. joint venture funding and otherwise sponsoring the commissioning of the implicated contracts and copyrights;

4) the Count 4 negligent performance of commissioning joint venture contract derived duties of fiduciary care and of trust owed to Petitioner Cawley;

5) the Count 5 state law quantum meriut recovery claim for services rendered and costs accrued alternative relief claim to Count 1;

6) the Count 6 state law claim for tortious interference by third party, ultra vires acting joint venturer, with in place joint venture contract advantages and reasonable expectations;

7) the Count 7 state law trespass claim for illicit accessing of confidential scholarship trade secrets "research banks" materials, including 17 USC 202 items and 17 USC 102(b) idea contents items;

8) the Count 8 reiteration of Count seven under state conversion claim, based on dispossession of chattels involved; and

9) the Count 9 Michigan Consumer Protection Act (MCLA 445.901 et seq; MSA 19.418(1) et seq) CONSUMER standing to sue claim, seeking individual rights consumer mechanism for enforcing legally U.S. scholarship trade (U.S. Government endorsed; 45 CFR 76, 689) customs of MINIMUM fair trade practices (rights NOT based on competitor standing to sue, as under 15 USC 1125(a), but on trade consumer "rights" to honest dealings)?

2. Whether, mindful of the Question 1 issues, reversal of the state courts' holdings below is mandated by both the patent, palpably wrong 17 USC 301 test and the Reason 17 (within) explained state trial court premising factually of the holding below on the existence of a NON-EXISTENT University of Michigan Press 1980 book by Anton-with-Cawley, which the trial court held to exist wrongly--at issue was simply a still unpublished TXu 333-410 Anton with Cawley manuscript that was commissioned by the held preempted state contracts, absent any further "press publication" that might even arguably "satisfy" the underlying contract disputes?

3. Whether, if reconsideration of the lower courts' 301(a) preemption dismissal is granted and the 301(a) holding is

revised, the lower state courts' further, "advisory" claim statement holdings ought to be vacated and remanded for reconsideration in light of proper 17 USC 301 holding and proper factual holdings (correcting other improper lower court constructions/applications of Copyright Act provisions that inherently lead to incorrectly distilled factual construction of the nine state claims)?

4. Whether, since the 17 USC 301(a) holding below also serves as a held defense in simultaneous federal action 87-70017-DT;90-1981 now pending on completed briefs before the 6th Circuit, this Court ought to simultaneously hear both these state and federal actions (reserving 90-1981 normal appeal rights) as to 301(a) bases of res judicata?

LIST OF PARTIES

The parties to the proceedings below are as follows:

The sole petitioner is Jerry P. Cawley.

The respondents are five (5) in number:

1) Thomas J. Anton, private individual party;
2) Trudi C. Miller, private individual party;
3) Steven Muller, personally served, but representing the Office of The President of Johns Hopkins University and, thus, Johns Hopkins University Press and its agents;
4) Howard Swearer, personally served, but representing the Office of The President of Brown University and

its agents;

5) The Board of Regents, The University of Michigan body corporate.

At and after the time of the events in question in this State of Michigan action 87-032631-CK;104130;87745, Trudi C. Miller was employed as a United States National Science Foundation program officer (later, director) before leaving NSF at or about 1985-86. However, she is sued herein in her private individual capacity since a formal NSF Conflict-Of-Interests 9-17-81 administrative ruling governing Federal Torts Claim Act and related matters (initiated by Miller as required by NSF rules) declared her conduct and its consequences at issue in this action to be OUTSIDE the scope of her

authorized NSF employment duties.

In a simultaneous federal action, described within in the "Collateral Federal Court Opinions" section appended to the "Opinions Below" section, the NSF Defendant formally pronounced Miller's conduct and consequences her private concern; the U.S. Department of Justice is NOT representing Miller. See 5-17-88 Federal Defendant Bloch's Motion To Dismiss Or Grant Summary Judgment supporting Brief, especially Exhibit G-1, the 9-17-81 NSF COI administrative ruling, in Cawley v. Swearer, United States District Court, Eastern District Of Michigan, action # 87-70017-DT; on appeal upon completed briefing to the United States Court Of Appeals for the Sixth Circuit, action # 90-1981.

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No. _____

IN THE SUPREME COURT OF

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October Term, 1990

JERRY P. CAWLEY, Petitioner

-vs-

STEVEN MULLER, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Michigan Supreme Court

The petitioner, Jerry P. Cawley, prays that a Writ Of Certiorari issue to review the August 27, 1990 Order of the Michigan Supreme Court denying a timely motion for reconsideration of the Michigan Supreme Court June 26, 1990

Order denying a delayed application for leave to appeal from a prior August 4, 1989 unpublished Memorandum Opinion of a Michigan Court Of Appeals panel affirming, albeit with added emphasis on the threshold lack of valid constitutionally required subject matter jurisdiction within the State Of Michigan courts due to 17 USC 301(a) U.S. Copyright Act preemption bases of dismissal, the initial State Circuit Court trial level September 28, 1987 Order Of Dismissal based on its September 15, 1987 unpublished Opinion.

OPINIONS BELOW

An unreported, nestled series of State of Michigan court opinions and orders are appealed from, as inventoried

below. These unpublished opinions and orders are reprinted in full, genuine copies as exhibits (as numbered below) in the seperate Appendix volume to this Petition.

EXHIBIT # 1 reprints the appealed from August 27, 1990 Michigan Supreme Court Order denying petitioner's timely motion for reconsideration of the Michigan Supreme Court's prior June 26, 1990 Order denying petitioner's delayed application for leave to appeal.

EXHIBIT # 2 reprints the Michigan Supreme Court's unpublished June 26, 1990 Order denying petitioner's delayed application for leave to appeal.

EXHIBIT # 3 reprints the October 16, 1989 Michigan Court Of Appeals panel's unpublished Order denying petitioner's timely motion for rehearing

of the initial August 4, 1989 panel's unpublished Memorandum Opinion.

EXHIBIT # 4 reprints the August 4, 1989 Michigan Court Of Appeals panel decision, which affirmed the State trial court's September 15, 1987 Opinion and September 28, 1987 Order Of Dismissal, albeit with a greater accentuation of the trial court's threshold lack of valid constitutionally required subject matter jurisdiction within the State of Michigan courts due to 17 USC 301(a) U.S. Copyright Act preemption bases of dismissal.

EXHIBIT # 5 reprints the initial September 28, 1987 State of Michigan Washtenaw County Circuit Court Order Of Dismissal based on the trial court's unpublished September 15, 1987 Opinion.

EXHIBIT # 6 reprints the State Of Michigan Washtenaw County Circuit Court unpublished Opinion of September 15, 1987, setting forth a dual, if not alternative, bases for the dismissal of the nine state law claims at issue in this appeal:

1) dismissal for lack of constitutionally requisite MCR 2.116(C)(4) subject matter jurisdiction due to 17 USC 301(a) U.S. Copyright Act preemption; and

2) a further MCR 2.116(C)(8) claim statement holding (albeit without normal MCR 2.116(I)(5) repleading opportunity due to the threshold 17 USC 301(a) preemption) in favor of Petitioner Cawley on seven (7) of nine (9) of the state claims on the relief theories actually pled (albeit the

state trial court ranged broadly, addressing fictitious claims conjured up by respondents, as opposed to pled by petitioner). Note: all State of Michigan trial level opinions are unpublished.

Additionally, EXHIBIT # 7 reprints the June 11, 1987 state trial court Oral Hearing Transcript at issue in the case, and EXHIBIT # 8 reprints the April 23, 1987 First Amended Complaint. Both documents are explicitly or implicitly referenced by the state trial judge in his September 15, 1987 Opinion and, thus, are essential to a proper understanding of the instant appealed from Michigan courts' unpublished opinions and orders.

COLLATERAL FEDERAL COURT OPINIONS

As Question 4 for review briefly raises under USSC Rule 14.1(a), since common citizen standards of just, efficient, economical litigation compel this pro per petitioner to at least NOTICE this Court of the fact, it bears notice that the disposition of the State of Michigan 87-032631-CK;104130; 87745 proceedings before this Court in this Petition is itself at issue as a defense basis under State of Michigan res judicata (claim preclusion and/or issue preclusion) doctrine in the following independent federal action:

--Cawley v. Swearer, et al., United States District Court, Eastern District Of Michigan, 87-70017-DT;

--on appeal upon completed briefs to the United States Court Of Appeals

for the Sixth Circuit, case number 90-1981.

The relation of this federal action 87-70017-DT;90-1981 to the instant proceeding is described in the "Statement Of The Case" section below. For now, but brief reprinting of the dispositive U.S. District Court June 19, 1990 Order adopting with modification a prior Magistrate's Report And Recommendations follows in full:

> Counts XXI, XXII, XXIII and XXIV are dismissed for lack of jurisdiction; Counts VII and XVI are dismissed for lack of jurisdiction; Counts I and X are dismissed for failure to state a cause of action and further as being barred by issue preclusion; Counts II, III, IV, V, VI, XI, XII, XIII, XIV and XV are dismissed on the basis of issue preclusion and/or res judicata; Counts VIII, XVII, IX, and XVIII are dismissed for failure to state a cause of action and/or issue preclusion; and Counts XIX and XX are dismissed as not involving any justiciable case or controversy.

JURISDICTION

As the "Opinions Below" section above itemizes, review here is sought of the Michigan Supreme Court's Order of August 27, 1990 denying timely motion for reconsideration of the Court's June 26, 1990 Order denying petitioner's delayed application for leave to appeal from the August 4, 1989 unpublished Memorandum Opinion of the Michigan Court Of Appeals panel affirming, albeit on somewhat modified bases, the original September 28, 1987 Order Of Dismissal entered by the Washtenaw County Circuit Court.

The jurisdiction of this Court to review the Michigan Supreme Court Order is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case centers on the U.S. Copyright Act, especially 17 USC 101, 102, 103, 106, 201, 301, 501, in light of the Berne Convention Implementation Act Of 1988. For the limited purposes of the Count 9 analysis, the Michigan Consumer Protection Act also figures. Pertinent sections are reprinted in full below.

17 USC 301 Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that

date and whether published or unpublished, are governed exclusively by this title, Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February

15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

17 USC 102 Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 USC 103 Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 USC 106 Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 USC 201 Ownership of copyright

(a) Initial Ownership.--Copyright in a work protected under this title vests

initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire.--In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works.--Copyright in each seperate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership.--

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights

comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer.--When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

17 USC 501 Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements

of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such ownership to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(17 USC 501(c-d-e) not pertinent)

17 USC 101 Selected Definitions

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting seperate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a seperate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit

it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is--

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for

publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

BERNE CONVENTION IMPLEMENTATION ACT OF 1988, PL 100-568, HR 4262, October 31, 1988, 100th Congress, 2nd Session 102 Stat 2853, 2853-2854 (1988):

Section 3 Construction Of The Berne Convention,

(a) Relationship With Domestic Law.--The provisions of the Berne Convention--

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) Certain Rights Not Affected.-- The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law--

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

State Of Michigan Consumer Protection Act, MCLA 445.901 et seq;

MSA 19.418(1) et seq

--To the extent that this state statute is implicated, it is set forth in the text. Mere application is involved.

STATEMENT OF THE CASE

KEY FACTS In 1978-79 the US National Science Foundation (NSF), thru the Municipal Finance Officers Association (MFOA), sponsored a joint venture to create and market a 17 USC 201(c) symposium volume. Independent contractors were commissioned, among them Anton and Cawley. With NSF-MFOA consent, Anton and Cawley agreed to jointly author their commissioned copyright under UNITARY tenant 17 USC 201(a) ownership since scholarship trade rules (endorsed by 45 CFR 76, 689) require ALL co-authors to assume credit/blame for any joint product as ONE UNITARY TEAM so that the integrity and merit of such products be enhanced, thereby reversing normal 17 USC 201(a) tenants in common presumption. Additionally, it was agreed that the commissioned work be only employed within

the "commissioning" NSF-MFOA joint venture volume organized/edited by Miller, that prior to commissioned copyright creation or afterwards no similar in idea contents and/or format of expression work be released by the co-authors abscent NSF-MFOA written approval, that the commissioned copyright be included within the NSF-MFOA volume when it was "published" for market and carry the truthful authorship credit line "Thomas J. Anton, with The Assistance of Jerry P. Cawley", and that, among other aspects about the year plus production timetable, Cawley receive the above authorship credit in lieu of fee for services/expenses.

By 9-1980 unpublished copyright TXu 333-410 by Anton with Cawley (authorship credit line) was fully completed and accepted by NSF-MFOA as done. For NSF-MFOA, Miller received the work under joint ven-

ture organizer/editor trust duty of care, holding it till 10-1981 publication contract with Johns Hopkins University Press was signed by Miller for ALL commissioned contributors. Thereafter, working with one (1) "lead author" from each commissioned "team" (Anton in this case), Miller was supposed to oversee usual de minimis "editorial" changes for publication (in fact, only one other contribution of all the contributions underwent significant changes at this stage). Finally, after usual press delay, marketed cloth and paperback editions were to appear.

However, between 1980 and press time, an independent dispute arose over knowing release as true empirical data what in fact was false empirical data by Anton in work funded for $300,000.00 by Miller's NSF Office. Pursuant scholarship trade customs, NSF policies (45 CFR

76, 689), Cawley grieved since he was a co-author of the improper products. In retaliation the following events resulted.

INITIAL CONTRACT BASED WRONGS The present nine contract based claims arose in 1984-85 when Anton and Miller (and thru them the other ratifying defendants) did NOT perform the 1978-79 NSF-MFOA commissioning contract based duties owed to Cawley. Defendants concede the proofs, countering that 301(a) preemption saves them since they were "smart enough" to potentially infringe independent copyright and Lanham Act marketing federal rights of Cawley when breaching the contract and relational state rights at bar.

1ST SET OF PROOFS They say that, tho NSF-MFOA records, trade customs and in fact Cawley performance business records prove the breaches, they (1) NOT ONLY failed to include the 1980 Anton with

Cawley TXu 333-410 still unpublished copyright within the 1984 cloth (1985 paperback) Public Sector Performance Miller edited NSF-MFOA joint venture volume (thus, the NON-PERFORMANCE of the commissioning terms), (2) BUT IN ADDITION, they replaced the scheduled Anton with Cawley contribution with a 17 USC 103(a), 201(e) unauthorized under 17 USC 201(a) unitary tenant terms Anton listed as sole author derivative/de minimis version of TXu 333-410, which dropped all authorship/owner credits of Cawley. 17 USC 301(a) preemption of the state claims follows, they say, since publication is at issue and copyrights are implicated. FURTHER MARKETING WRONGS AND PROOFS In reply, Cawley argues the 1978-80 based instant contract based claims form a different transaction from the still con-

tinuing marketing harms from 1984-91, based on federal (15 USC 1125(a); 17 USC 501), not state, claims, involving different proofs and remedies, and by party agreement litigated in federal action 87-70017-DT;90-1981.

THE RECORD BELOW The APPENDIX VOLUME to this Petition reprints the below complaint, oral argument and court opinions.

TIME WHEN THE FEDERAL QUESTION FIRST AROSE IN THE STATE COURT PROCEEDINGS BELOW AND CIRCUMSTANCES

Upon agreement to repleading and defendant waiver of non-joinder of claims and abatement defenses coupled with refusal of removal to federal court, the defendants' pressed the 301(a) defense, with Brown University personal jurisdiction defense. Preemption followed.

REASONS FOR GRANTING THE WRIT

REASON # 1

--THE MICHIGAN STATE COURTS' HOLDING BELOW DECIDES (INCORRECTLY) WHAT ALL JUDGES, LAWYERS AND COMMENTATORS AGREE IS THE SINGLE MOST IMPORTANT FEDERAL QUESTION CONCERNING THE U.S. COPYRIGHT ACT STILL LEFT (LAMENTABLY) UNADDRESSED DIRECTLY BY THIS COURT; THE 17 USC 301 PREEMPTION TEST ISSUE.

Viewed narrowly by focusing solely on Copyright Law, a consensus exists within legal and scholarship circles that the clarification of the 17 USC 301 preemption test constitutes the foremost U.S. Copyright Act federal question still lamentably left unaddressed directly by this Court. As A. Latman, R. Gorman, J.C. Ginsberg, eds., Copyright For The Eighties, p. 595 (Va. 1985, 2d ed), put the matter:

> There is hardly a more significant (and probably no more troublesome) question underlying the Act than the preemptive effect of this provision. Basically, this question is: How much of the common law (or state statutory law), particularly that of unfair competition, is left standing or is permitted to develop by the new copyright law?

What accentuates the importance of this federal 17 USC 301 question, however, resides in the broader FEDERALISM interpretation of the 301 preemption test question. Briefly put, the U.S. Copyright (and related Patent and Trade Mark) law protections are but one part of a vastely larger complex of Intellectual Property Law which regulates the increasingly more central economic and governance presences of research based technologies within the United States of America and the world (i.e., via the Berne Convention Treaty). Just as these technologies are constantly

evolving, so too applicable federal-state (international) law regulating the technologies is always in an emergent state.

Consequently, a pressing public policy need exists for this Court to not only clarify the 301 preemption test per se, but to also do so in a way NOT overbroadly construing (as the lower courts did in this case) the scope of the 17 USC 301(a) preemptive effect to the UNJUST preclusion of other valid and necessary areas of state regulation addressing contract rights, relational interests (i.e., confidence, fiduciary, trust, access to trade secret research technology banks), and marketing rights which Congress did NOT intent to preempt under 17 USC 301(b)(1) or 17 USC 301(b)(3). This Court started this task in its well

received Kewanee Oil Co v, Bicron Corp, 416 US 470, 94 S Ct 1879, 40 L Ed 2d 315 (1974), and Aronson v, Quick Point Pencil Company, 440 US 257, 99 S Ct 1096, 59 L Ed 2d 296 (1979) holdings. But the job is a large and continuing one, meriting MORE ATTENTION ROUTINELY from this Court. For, as Latman et al., Copyright For The Eighties, op cit., p. 527, note:

> The intricacies of copyright ... should not obscure the fact that we have been dealing with a narrow area of law. We need not dwell on the seamlessness of law or the obvious interfacing of copyright with contracts, tax, federal procedure, etc. We should note, however, the frequency with which a claimed interference with rights related to intellectual property cannot be fully articulated in terms of an infringement of copyright. Among the variety of legal theories potentially applicable, several characteristically appear. .... Each of them is a field unto itself and is frequently explored in detail in advanced courses. (Emphasis added.)

The instant case shows the need for this Court to advance this job further.

REASON # 2

--ABSCENT A DIRECT RULING CLARIFYING THE 17 USC 301 PREEMPTION TEST BY THIS COURT, JUDICIAL CONFUSION, CONFLICTING INTERPRETATIONS AND AD HOC (IF NOT, AS HEREIN, UNJUST) DISPOSITIONS OF 17 USC 301 FEDERAL QUESTIONS WILL CONTINUE TO BEDEVIL FEDERAL AND STATE LITIGATION ACROSS THE NATION, NEEDLESSLY CHILLING 1ST AMENDMENT RIGHTS TO COURT ACCESS FOR MERITS DETERMINATION OF CLAIMS IN ACCORDANCE WITH APPROPRIATE COURT RULES BY VIRTUE OF (1) DISCOURAGING THE LIMITED SEGMENT OF THE "LOCAL BAR" TRULY EXPERT IN INTELLECTUAL PROPERTY LAW FROM ASSUMING REPRESENTATION DUTIES ON CONTINGENCY FEE BASES, (2) COERCING LITIGANTS TO DROP OTHERWISE PROPER CLAIMS FOR WANT OF LEGAL REPRESENTATION, OR (3) FORCING LITIGANTS TO ACT PRO PER IF THEY

LACK SUFFICIENT MONETARY RESOURCES TO HIRE TRULY EXPERT COUNSEL, BUT DO NOT WISH TO FORSAKE PROPER CLAIMS OR GET UNHAPPILY ASSOCIATED WITH THE FRINGE ELEMENT OF THE LOCAL BAR THAT, HAVING A LICENSE, WILL FOR SMALL FEE WILL TAKE ANY CASE, REGARDLESS OF THEIR TRUE SUBJECT MATTER COMPETENCY.

The second reason why a Writ ought to issue in this case concerns the absolutely fundamental 1st Amendment right to access the U.S. federal court system for merits determination of valid claims for relief in accordance with applicable court rules (Boddie v. Connecticut, 401 US 371, 91 S Ct 780, 28 L Ed 2d 113 (1971)). Tho a pro per petitioner out of financial necessity, at issue is MUCH MORE than "just" pro per access rights properly recognized by this Court (Haines

v. Kerner, 404 US 519, 520, 92 S Ct 594, 30 L Ed 2d 652, 654 (1972)).

At issue is whether a minimum level of generalist legal expertise in intellectual property law related subject matters currently exists across the USA to ROUTINELY allow fundamentally fair, merits resolution of valid claims in state or federal courts ABSCENT more piloting holdings from this Court? Petitioner pro per respectfully submits (1) such requisite subject matter expertise is lacking, and (2) remedial piloting opinions by this Court are sadly needed--indeed, begged for by lower level judges, lawyers, litigants and potential litigants (i.e., scholarship trade administrators and practitioners) alike.

REASON # 3

--CARDINAL FEDERAL INTERESTS IN MAINTAINING A CONTINUING CONSTRUCTIVE COMITY RELATIONSHIP BETWEEN FEDERAL AND STATE COURT SUBJECT MATTER DOMAINS AND ADJUDICATION PRACTICES ARE DIRECTLY AND DETRIMENTALLY LAID BARE BY THE MICHIGAN STATE COURTS' HOLDING BELOW, THEREBY RECOMMENDING A HOLDING BY THIS COURT IN ORDER TO PROPERLY UMPIRE THE CONTINUING WORKINGS OF THE UNITED STATES FEDERAL COURT SYSTEM.

The instant (improper) 301(a) holding below, coupled with its (improper) further usage in federal action 87-70017-DT;90-1981 as the basis for a claim/issue preclusion defense (open to multiple challenges) combine to illustrate the serious, significant COMITY PROBLEM to U.S. court system operations presented by 301.

Once when state versus copyright jurisdiction existed was the lead comity issue: Arthur Young & Co v. City Of Richmond, 895 F2d 967. 969 n 2 (4th 1990):

> The line between cases that "arise under" patent and copyright laws, as contemplated by 28 U.S.C. 1338(a), and those that present only state law contract issues, is "a very subtle one," C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure 3582, at 307, and the question leads down "one of the darkest corridors of the law of federal courts and federal jurisdiction." Id. at 307 n. 11 (quoting Chisum, The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation, 46 Wash. L.Rev. 633 (1971)).

See T B Harms Co v. Eliscu, 339 F2d 823 (2d 1964), cert den, 381 US 915, 85 S Ct 1534, 14 L Ed2d 435 (1965); 3 Nimmer On Copyright 12.01(A).

NOW, 17 USC 301 compounds the 28 USC 1338(a) issue by making it the 17 USC 301(b)(1) FIRST PRONG of the 301 test, and ADDING the bedeviling 17 USC 301(b)(3) equivalency to 106 test.

REASON # 4

--THE MICHIGAN STATE COURTS' HOLDING IS INCONSISTENT WITH CONGRESS'S EXPRESS PURPOSE IN ENACTING THE U.S. COPYRIGHT STATUTE AND ITS KEYSTONE 17 USC 301 PREEMPTION TEST, IN LIGHT OF CONGRESS RECOGNIZED 9TH AND 10TH AMENDMENT RESERVED COMPLEMENTARY STATE LAW BASED RIGHTS AND OBLIGATIONS, AND U.S. TREATY OBLIGATIONS UNDER THE BERNE CONVENTION.

As also the case in CCNV v. Reid, 490 US ___, 109 S Ct 2166, 104 L Ed2d 811, 830 (1989), the holding below is inconsistent with and

> ... would impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership. See HR Rep No. 94-1476, supra (sic: infra), at 129. In a "copyright marketplace," the parties negotiate with an expectation that one of them will own the copyright in the completed work. Dumas (v. Gommerman), 865 F2d (1093), at 1104-1105, n 18. With that expectation, the parties at the onset can

settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

The decision below so overly broadly stretches 17 USC 301(a) ambit at the improper expense of 17 USC 301(b)(1)(3) precluded from preemption state claims that the decision violates the 9th and 10th Amendments of the US Constitution. Preempted improperly are precisely the state law this Court notes the 1976 Act RELIES on to govern 17 USC 201 ownership rights and relational and marketing rights among parties.

REASON # 5

--THE MICHIGAN STATE COURTS' HOLDING IS "PLUM CONTRARY" TO A PROPER PLAIN LANGUAGE CONSTRUCTION OF THE 17 USC 301 PREEMPTION TEST AND EQUALLY CONTRARY TO THE PROPER PLAIN LANGUAGE CONSTRUCTION OF OTHER, COMPLEMENTARY PROVISIONS OF

THE COPYRIGHT ACT IMPLICATED WITHIN ANY PREEMPTION TEST--i.e., 17 USC 102, 103, 106, 201, 204, 205, 411, 501--AS INDICATED BY U.S. CONGRESSIONAL REPORTS.

A strict construction of 17 USC 301 preemption test is due (as indicated in CCNV v. Reid, 490 US ___, 109 S Ct 2166, 104 L Ed2d 811, 829 n 14 (1989)). Given the statute, the proper 301 test is set forth in Crow v. Wainwright, 720 F2d 1224, 1225-26 (11th 1983), cert den, 469 US 819, 105 S Ct 89, 83 L Ed2d 35 (1984):

> Section 301 in effect establishes a two-pronged test to be applied in preemption cases. We must decide whether the rights at issue fall within the "subject matter of copyright" set forth in sections 102 and 103 and whether the rights at issue are "equivalent to" the exclusive rights of section 106. Harper & Row, Publishers v. Nation Enters., 501 F.Supp. 848, 850 (S.D.N.Y. 1980). (Note omitted.)

This construction emphasizes equally 17 USC 301(b)(1) and 301(b)(3) exceptions to 17 USC 301(a) preemption.

Tho a subtle difference at first, the lower courts (like many published opinions) shortcircuited proper 301 test by assuming 301(b)(1) not applicable merely because a copyrignt was factually implicated in the claimed state rights. This error was then compounded by holding 301(b)(3) exceptions invalid since the contract rights at issue were preconditional to future exercise of 106 rights and, thus, equivalent. This improper 301 test leaves NO STATE LAW!

REASON # 6

--THE MICHIGAN STATE COURTS' HOLDING IS INCONSISTENT WITH EXISTENT COPYRIGHT ACT HOLDINGS BY THIS COURT, ESPECIALLY CCNV V. REID, 490 US ---, 109 S Ct ---, 104 L ED2d 811 (1989).

See also, Mills Music, Inc v. Snyder, 469 US 153, 105 S Ct 638, 83 L Ed2d 556.

REASON # 7

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 1 STATE CONTRACT LAW RIGHT CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

The below 17 USC 301(a) Count 1 preemption holding (valid, if NOT proven state non-performance of contract claim was conceded) is not only contrary to the below Circuits, but 180 degrees contrary to the plain language of the U.S. Copyright Act itself: the Act deliberately RELIES upon complementary, collateral state contract based law to regulate the commissioning of copyrights, their ownership under 17 USC 201, their 17 USC 106 usages following creation, authorship credit lines affixed to them (left outside 17 USC 102, 103 Copyright Act

subject matter sweep and not equivalent to any 17 USC 106 statutory rights), any transfers of ownership, royality agreements, publication and marketing agreements, or covenant duties governing idea contents reported (in part) within copyrights, and party marketing relations.

Thus, Count 1 properly seeks state remedy for non-performance of contract obligation assuring joint, truthful authorship attribution credit line affixed to the NSF-MFOA commissioned jointly authored Anton with Cawley unpublished TXu 333-410 copyright upon its marketing release exclusively within the Miller 17 USC 201(c) joint venture volume. The claim follows these prior holdings:

--Granz v. Harris, 198 F2d 585, 588-589 (2d 1952);

--Stepdesign, Inc v. Research Media, Inc, 442 F Supp 32, 34 (SD NY 1977);

--Wolfe v. United Artists Corp, 583 F Supp 52, 54-57 (ED Pa 1983);

--Wolfe v. United Artists Corp, No. 80-6957, pp. 8-10(SD NY 7-21-83), aff'd without opin, 742 F2d 1439 (2d 1983);

--Locke v. Times Mirror Magazine, Inc, 25,750 1985 CLD 19,368, 19,370-71 (SD NY 1985).

Since the right to truthful authorship credit line attribution is a mark right, both outside 17 USC 102, 103 subject matter under 17 USC 301(b)(1), and NOT equivalent to 106 rights via 301(b)(3), 17 USC 301(a) preemption is NOT proper! US CONGRESS Congress has indicated this NON-preempted status at least thrice. First, as drafted, the Copyright Act in fact relies on complementary, collateral state legal instrumentalities to exercise copyright ownership rights, subject to the Act, including recordation provisions of certain state contract agreements. Thus, as since Carter v. Bailey,

64 Me 458, 463 (SC Maine 1874) at least, joint authors may exercise 17 USC 201(a) ownership rights either as tenants in common (the presumed form) or as unitary tenants (the presumed form in many foreign counties under the Berne Convention; 3 Nimmer On Copyright, 17.07(B), 1987 ed); HR Rep No 1476, 94th Cong, 2d Sess, 1, 120-121, 5 US Code Cong & Ad News, 5659, 5736 (1976). Second, the right to truthful authorship credit line attribution affixed to any copyright is NOT governed by the Copyright Act. Congress stressed this fact in the Berne Convention Implementation Act Of 1988, Sec. 3, 4, 6, 102 Stat 2853 (1988). Sen Rep No 100-352, 1, 9-10, 6 US Code Cong & Ad News, 3706, 3714-3716 (1988). Third, among NON-preempted state protections, Congress expanded 15 USC 1125 federal unfair trade practice marketing

rights in PL 100-667, 102 Stat 3935, to augment traditional state law remedies.

Hence, Congress meant it when it said of the 17 USC 301(a) provision,

> Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract;....
> (HR Rep No 1476, 1, 132, 5 US Code Cong & Ad News, 5659, 5748 (1976))

DC CIRCUIT In CCNV v. Reid, 846 F2d 1485, 1498-99 (DC Cir 1988), aff'd on 17 USC 101, 201(b) grounds, 490 US ___, 109 S Ct 2166, 104 L Ed2d 811 (1989), the DC Circuit implicitly recognized commission contract terms NOT preempted, and further noted that truthful authorship attribution credit line rights are protectable under 15 USC 1125(a) or any Berne Convention compatible non-marketing state rights, such as contract terms, tho no such contract terms existed in CCNV v. Reid factual circumstances. In

accord: Peckarsky v. ABC, Inc, 603 F Supp 688, 692-93, 695-96 (D DC 1984) (contract terms not preempted).

4TH CIRCUIT In Acorn Structures, Inc v. Swantz, 657 F Supp 70, 26,116 1987 CLD 21,109 (WD Va Char Div 1987), rev'd, __ F2d ___, 26,251 1988 CLD 21,739-4, at 21,739-4 (4th 1988), the 4th Circuit reversed per curiam a lower court preemption of a contract claim, noting:

> Plaintiff's claim for breach of contract entails a distinct cause of action which is clearly not within the subject matter of copyright but arises out of the implicit contractual provisions of the design agreement. Swantz was not committed to purchase a house package from Acorn. However, Acorn prepared the plans for Swantz, only "as a prospective customer of an Acorn house package." Implicit in the contract between Acorn and Swantz was an agreement that while Swantz did not have to use Acorn's plans, if he did use Acorn's plan then he was obligated either to purchase the plans from Acorn or to purchase his building materials from Acorn. This agreement is clearly implied by the contract. Acorn's cause of action is based upon this implicit

> provision of the contract which does not arise out of the subject matter of copyright and is therefore a separate and distinct cause of action.
>
> Accordingly, we hold that the district court erred in its judgment that plaintiff's claim for breach of contract is preempted by federal copyright law.

In accord: Arthur Young & Co v. City Of Richmond, 895 F2d 967, 971 (4th 1990), holding contract claim seperate and preconditional to copyright claim.

5TH CIRCUIT More on 17 USC 301(b)(3), than 17 USC 301(b)(1), grounds, the 5th Circuit also held preemption of contract claims IMproper in Taquino v. Teledyne Monarch Rubber, 893 F2d 1488, 1490 adopting the appended District Court opinion which notes at 1501 (5th 1990):

> As noted below, this court finds that Taquino breached the contract. Having done so, he cannot claim the benefits of it to afford himself commissions coming due following his breach.
>
> The contract forbade Taguino from representing a competing company prior

to termination. This is a valid provision. By designing and seeking to patent and build his own competing device, and by taking steps to have his company added to the approved vendor list of Tenneco. TMR's best customer, Taquino did breach his contract. See, e.g., Dufau. supra (sic: Dufau v. Creole Engineering, Inc., 465 So2d 752 (La App 1985)).

Further, Taquino used TMR drawings in his sales materials. The contract properly prohibited this. The right to claim this breach of contract is not preempted by the copyright laws. Universal Gym Equipment, Inc v. Atlantic Health & Fitness Products, 229 U.S.P.Q. 535 (D.Md.1985). 17 USC 301 only preempts rights equivalent to the exclusive rights within the general scope of the copyright law. A right is equivalent if the mere act of reproduction, distribution, or display infringes it. 17 USC 106; Allied Artists Pictures Corp v. Rhodes, 496 F Supp 408 (SD Ohio 1980), aff'd, 679 F2d 656 (6th Cir 1982); Harper & Row Publishers, Inc v. Nation Enterprises, 723 F2d 195 (2nd 1983). This action for breach of contract involves an element in addition to mere reproduction, distribution, or display: the contract promise made by Taquino, therefore, it is not preempted. Smith v. Weinstein, 578 F Supp 1297 (SD NY 1984), aff'd, 738 F2d 419 (2nd 1984); Nimmer, Nimmer on Copyright, 16.04(C)(1985).

In accord: Zim v. Western Publishing Co,

573 F2d 1318 (5th 1978), wherein no preemption defense was even raised.

9TH CIRCUIT Tho not ruling directly on the contract term preemption issue evidently, implicitly the 9th Circuit has indicated preemption is IMproper thru at least the below series of holdings: Oddo v. Ries, 743 F2d 630, 634 (9th 1984)(license contract valid); Topolos v. Caldeway, 698 F2d 991, 994-95 (9th 1983)(preconditional contract and copyright claims distinct and complementary, as held below in); Effects Associates, Inc v. Cohen, 817 F2d 72, 73 (9th 1987); 908 F2d 555, 557-58 (9th 1990); Dumas v. Gommerman, 865 F2d 1093 (9th 1989); Hal Roach Studio v. Richard Feiner & Co, 896 F2d 1542, 1554 (9th 1990).

2ND CIRCUIT Thru affirmations without opinions and implicitly, the 2nd Circuit has indicated contract terms are NOT sub-

ject to valid preemption: Wolfe v. United Artists Corp, op cit; Locke v. Times Mirror Magazine, Inc, op cit; Gilliam v. ABC, 538 F2d 14, 19-24 (2d 1976)(license valid); Smith v. Weinstein, 578 F Supp 1297, 1307 (SD NY 1984), aff'd without opin, 738 F2d 419 (2d 1984); Whitfield v. Lear, 582 F Supp 1186, 1189 (ED NY 1984), rev'd and rem'd on other grounds, 751 F2d 90 (2d 1984)(implied in fact contract NOT preempted); Custom Import Inc v. Hanmee Trading Co, Inc, 596 F Supp 1126 (SD NY 1984)(implicitly not preempted); Angel Music, Inc v. ABC Sports, Inc, 25,923 1986 CLD 20,227, 20,232 (SD NY 1986)(license); Kelley v. April Music, 26,237 1988 CLD 21,693, 21,694-95 (SD NY 1988)(royalty contract); Ronald Litoff, Ltd v. American Exp Co, 621 F Supp 981, 986 (SD NY 1985)(joint venture contract); Salinger v. Random

House, Inc, 811 F2d 90, 100 (2d 1987), cert den, ___ US ___, 108 S Ct 213, 98 L Ed2d 177 (1987)(third party library access contract implicitly valid).

Even the 2d Circuit holding the lower courts relied upon supports the Petitioner, Harper & Row, Publishers v. Nation Enterprises, 501 F Supp 848 (SD NY 1980), aff'd, 723 F2d 195 (2d 1983), rev'd and rem'd on other grounds, 471 US 539, 105 S Ct 2218, 85 L Ed2d 588 (1985), once divergent Harper & Row case facts are properly distinguished as follows:

1) underlying Ford-Harper & Row-Time contracts were held valid, as herein;
2) 301(a) preemption only applied to Nation's usage of the illictly secured manuscript since NO RELATIONAL OBLIGATIONS bound Nation with Ford et al; here by contract the parties are bound as joint ventures.

7TH CIRCUIT In WGN Continental Broad Co v. United Video, 693 F2d 622 (7th 1982) the 7th Circuit implicitly held contracts not subject to preemption. See also, Baltimore Orioles v. Major League Baseball Players, 805 F2d 663 (7th 1986), cert den, ___US ___, 107 S Ct 1593, ___ L Ed2d ___ (1987).

11TH CIRCUIT In Trust Co Bank v. MGM/UA Enter Co, 772 F2d 740 (11th 1985) and MGB Homes, Inc v. Ameron Homes, Inc, 903 F2d 1486 (11th 1990), the 11th Circuit implicitly held contracts not subject to valid preemption.

OTHER CIRCUITS Other implicit Circuits' NON-preemption of contract holdings could be cited, just as 301(a) holdings ALL NOT involving relational party ties (i.e., Ehat v. Tanner, 780 F2d 876 (10th 1985)) or contracts could be distinguished. State contracts are NOT preempted!

REASON # 8

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 2 STATE COMMISSIONING OF THE CREATION OF A COPYRIGHT FOR EXCLUSIVE PUBLICATION INCLUSION WITHIN A SPECIFIC COLLECTIVE WORK CONTRACT LAW RIGHT CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 2 states a simple non-performance of publication/marketing state contract agreement, following Zim v. Western Publishing Co, 573 F2d 1318 (5th 1978); Random House, Inc v. Gold, 464 F Supp 1306 (SD NY 1979), aff'd without opin, 607 F2d 998 (2d 1979). The lower courts, upon largely conceded proofs, held the claim valid, but pre-

empted under 17 USC 301(a) since the right to publish a copyright was one of the ennumerated 17 USC 106 rights.

This view misunderstands the Act's requirement of 17 USC 201 ownership as precondition of exercise of 106 rights via state contract agreements not subject to preemption. Authorization to validly exercise 106 rights is at issue, with defendants NOT PERFORMING a promised commissioning contract obligation. Thus, for all the reasons noted in the preceding "Reason # 7" section on Count 1, preemption is NOT proper.

This claim does not involve the exceeding of contract terms in violation of 106 rights UPON COMPLETE FULFILLMENT of prior, non-preempted contract terms, as in Burnett v. Warner Bros Pictures, 25,761 1985 CLD 19,417, 19,419 (NY Sup Ct, NY Cnty, Pt 1, Spec Term 1985).

REASON # 9

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 3 CONTRACT DERIVED STATE COVENANT DUTY NOT TO COMPETE CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 3 is a claim for breach of a state covenant duty not to compete with the Miller organized NSF-MFOA joint venture symposium volume creation project. The lower courts found the contract based claim valid, but preempted since, at defendants wish (pursuant standard scholarship trade customs) the joint venture contract terms included this legal duty to NOT market any work akin in IDEA CONTENTS or format of expression to the exclusively commissioned joint venture collective work contributions. This duty

governed party relational interests before the time of copyright fixation as to format of expression, and always as to IDEA CONTENTS similarities NOT regulated by Copyright under 17 USC 102(b). Bromhall v. Rorvik, 478 F Supp 361, 367 (ED PA 1979); Nash v. CBS, Inc, 899 F2d 1537 (7th 1990)(no copyright remedy).

Like Count 1, Count 3 is a contract based claim, not subject to preemption. Taquino v. Teledyne Monarch Rubber, 893 F2d 1488, 1490, 1497-98 (5th 1990), as quoted above at p. 36 ; Fantastic Fakes, Inc v. Pickwick Interm, Inc, 661 F2d 479, 483-484 (5th, Unit B 1981); Balboa Ins Co v. Trans Global Equities, 267 Cal Rptr 787, 795 (CA CALIF 3RD DIST 1990).

The below improper preemption of this claim would negate the purpose of joint venture originating agreements.

REASON # 10

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 4 NEGLIGENT PERFORMANCE OF STATE CONTRACT ASSUMED DUTIES CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 4 states an alternative claim for relief to the Counts 1 and 2 contract claims. At issue is joint venture organizer/editor Miller's negligent performance of her contract derived, fiduciary level of care duty to Cawley to see that mere mistake/confusion on Johns Hopkins University Press's part did NOT "breach" the commissioning contracts, as happened herein, by leaving out Cawley's due junior co-author credit line attribution from the final published editions, in

contrast with 1980 completed TXu 333-410 unpublished manuscript entrusted to Miller's care. The lower courts agreed this duty was in fact violated if a fiduciary relationship existed, but they refused to recognize one and found the claim otherwise preempted as in Counts 1 thru 3.

The "negligence" at issue arises outside (17 USC 301(b)(1)) and beyond (17 USC 301(b)(3)) Copyright Act subject matter jurisdiction. Further, fiduciary obligations inhere in the Miller joint venture arrangements placing in her care (TRUST) post-creation publication efforts. Like fiduciary claims generally, Count 4 is NOT preempted. Balboa Ins Co v. Trans Global Equities, op cit, 267 Cal Rptr 787, 802-803 (1990)(collecting case citations and CORRECTING 9th Circuit California law interpretation somewhat).

REASON # 11

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 5 STATE LAW QUANTUM MERIUT CLAIMS FOR SERVICES RENDERED AND EXPENSES ACCRUED RECOVERY ARE SUBJECT TO PRE-EMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 5 recognizes that Cawley exchanged (a) payment for services rendered and expenses incurred for (b) the co-authorship credit line attribution at issue in Counts 1-2 since he was working on another federal grant contract at the time of creation herein. Thus, based on his performance of the commissioning terms, but defendants' breaches, he claims due pay and expenses. The lower courts found this alternative relief

valid, but preempted.

As held in Schuchart & Assoc v. Solo Serve Corp, 540 F Supp 928, 945 (WD TX SA Div 1982); Brignoli v. Balch Hardy And Scheinman, Inc, 645 F Supp 1201, 1205 (SD NY 1986), such a claim arises in contract outside Copyright Act regulation and involves labor-expense commissioning agreement extra-elements. It is NOT subject to preemption. Further, relational obligations among co-author/ co-owners are at issue and such rights (of all precise kinds) are left to state law under the Copyright Act (Korman v. Iglesias, 736 F Supp 261, 265 (SD Fla 1990), citing CCNV v. Reid, op cit, 846 F2d 1485, 1498; Weissmann v. Freeman, 868 F2d 1313, 1317-18 (2d Cir), cert den, ___US ___, 110 S Ct 219, 107 L Ed2d 172 (1989); Oddo v. Ries, 743 F2d 630, 633 (9th 1984)).

REASON # 12

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 6 STATE LAW CLAIMS FOR THIRD PARTY ULTRA VIRES ACTING JOINT VENTURER TORTIOUS INTERFERENCE WITH IN PLACE CONTRACT/BUSINESS ADVANTAGES ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 6 seeks relief for Anton's tortious interference with the in place Cawley-Miller joint venture commissioning contract promises based on Michigan law in Stack v. Marcum, 147 Mich App 756, 759-760, 382 NW2d 743 (1985). At issue is is NOT JUST Anton's failure to perform the Count 1 contract obligation, but his FURTHER intentional procuring of Miller's non-performance of the Count 2 contract

duty owed Cawley and the Count 3 further duty not to compete with the Miller lead NSF-MFOA joint venture commissioning terms and arrangements among parties. The lower courts found Count 6 valid, but preempted since incidental to the admitted breach was a further potential infringement of Cawley's copyright act rights which excused the tortious conduct of Anton that was also contrary to fiduciary duties of care Anton owed to Cawley, Miller and other joint venturers.

Preemption is NOT proper since relational legal obligations among contract bound joint venturers is at bar. Copyright does NOT govern such matters. For somewhat analogous holdings precluding preemption, see Uncle Jam Records v. Warner Bros, 25,580 1983 CLD 18,428, 18,430 (SD NY 1983); H_2O Swimwear v. Lomas, 560 NYS2d 19, 20-22 (SC NY APP DIV 1ST 1990).

REASON # 13

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 7 STATE LAW TRESPASS TO SCHOLARSHIP TRADE CONFIDENTIAL RESEARCH BANKS "TRADE SECRETS" CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 COPYRIGHT ACT PROVISION.

Counts 7 and 8 address, alternatively, a central scholarship trade regulatory issue not settled at law yet. All scientific research is like an ICE-BERG, with discrete publications comprising the "TIP" of the Ice-Berg and being covered, as the case may be, by copyright, other marketing law, contract or relational laws. However, submerged is the keystone scholarship trade commodity--empirical "RESEARCH BANKS"--and a more central trade regulatory issue--"ACCESS" to the

substantive idea contents and empirical supporting documentation within the "research banks".

Painstakingly put together thru the years, each scholar's unique "research bank" portfolio provides a "base area" from which to issue a series of discrete works establishing the scholar's mark as an expert in a field and, thus, leading to job and grant opportunities. The better a scholar's "research bank", the better the likely scholarship. The contents vary by field/method, but in idea value are akin to "trade secrets" and are always kept "private" or "confidential" since they represent a scholar's in-progress "life's trade work". Part of the contents are copyrights per se, but most of the files are working ideas, facts, bibliographies, or West Law-like literature summary "keynotes".

Trade secret or confidentiality law may shield "research banks", but the key trade issue remains "ACCESS" since over the years scholars will give limited purpose licenses to access a bank in return for similar access or as part of a one-time co-authorship effort. Thus, limited license access permits may be many and extend thru time, so as to make the "reverse engineering" intellect of the trade secrets knowable, and the confidentiality of the varied idea contents guessable. Yet, within the scholarship trade, priority remains with the "research bank" creator, and all other scholars owe affirmative duty to credit the creator for access, as licensed, to the contents.

Absent this cardinal trade governance device, cumulative knowledge advancement would be disasterously derailed since (1) open trade communication would

be precluded by (2) legally allowed theft of years in the making work. It would no longer pay to do the research.

Given the above trade principles, in Count 7 Cawley claims that Anton by NOT performing the Counts 1-3 contract duties forfeited his "limited license" to access Cawley's "research bank" for joint venture purposes, and thereby trespassed upon Cawley's dominion to control access rights when he relied upon materials publically subsequently instead of adhering to trade cannons and refraining from relying upon Cawley's materials, knowledge of which derives from Cawley, not reverse engineering or the marketplace of free ideas. As in Gladstone v. Hillet, 26,336 1988 CLD 22,157, 22,162-63 (CA CALIF 1ST DIST 1988), Anton NOT ONLY violated the initial access agree-

ment, but FURTHER violated independent Restatement (2d) Of Torts, Sec. 321-322 legal duties to cease illicit accessing, and aid Cawley by holding to the initial access terms, crediting his work, and returning 17 USC 202 copies of Cawley's physical materials to him.

The lower courts found Count 7 a valid, but preempted claim. The trial court never understood the scholarship trade rationale, however; hence, the very ranging dictum, abscent discovery chance.

Like trade secret or confidentiality breach claims (Balboa Ins Co v. Trans Global Equities, op cit, 267 Cal Rptr 787, 797-803 (1990)(citing the lead cases)), this illicit "access" trespass claim arises from relational party joint venture rights outside and beyond Copyright scope under 17 USC 301(b)(1)(3). This claim is the kind of progeny of

International News Service v. Associated Press, 248 US 215, 39 S Ct 68, 63 L Ed2d 211 (1918) that Congress expressly exempted from valid preemption in HR Rep No 1476, op cit, 1, 132-33, 5 US Code Cong & Ad News, 5659, 5748 (1976).

REASON # 14

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 8 STATE LAW CONVERSION OF SCHOLARSHIP TRADE CONFIDENTIAL RESEARCH BANKS "TRADE SECRETS" CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 8 reiterates Count 7 under a conversion claim that the lower courts found preempted; the trial court initially held no claim. Given dispossession, the claim is valid and not preempted.

REASON # 15

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 9 STATE CONSUMER PROTECTION ACT STATUTORY KIND OF CLAIM IS SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 9 seeks to secure Michigan Consumer Protection Act, MCLA 445.901 et seq;MSA 19.418(1) et seq. injunctive CONSUMER STANDING TO SUE relief. It enforces general U.S. scholarship trade, U.S. Government (45 CFR 76, 689), U.S. National Academy of Sciences (On Becoming a Scientist, 14-21 (1989)) endorsed MINIMUM scholarship trade practice marketing standards, prohibiting marketing knowingly or negligently of false empirical data as tho true or affixation of false authorship credit lines to any

trade products. In contrast with 15 USC 1125(a) federal law requiring competitor, NOT consumer, standing and, thus, protecting different rights/interests, the state law happily allows any scholar to secure remedial injunction to protect their own trade practitioner consumer interests. The lower courts held Count 9 valid on the theory pled, but preempted, abscent comprehension of the significant scholarship interest at bar.

Preemption is improper since the statute prohibits misrepresentation or other deceptive trade practices outside and beyond Copyright Act scope under 17 USC 301(b)(1) and (3). Allied Artists Picture Corp v. Rhodes, 496 F Supp 408 (SD OHIO ED 1980), aff'd 679 F2d 656 (6th 1982); Associated Film Dist Corp v. Thornburgh, 683 F2d 808 (3rd 1982); Ballas Buick-GMC v. Taylor Buick, 25,550

1983 CLD 18,239, 18,240 (C Pl Ct Lucas Cnty Ohio 1981); Garrido v. Burger King Corp, 558 So2d 79, 83 (CA FLA 3rd 1990); Donald Frederick Evans v. Continental Homes, Inc, 758 F2d 897, 914 (11th 1986); Taquino v. Teledyne Monarch Rubber, op cit, 893 F2d 1488, 1490, 1499 (5th 1990); Valente-Kritzen Video v. Pickney, 881 F2d 772, 776 (9th 1989).

REASON # 16

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED STATE COURT HOLDINGS APPLYING THE 17 USC 301 U.S. COPYRIGHT ACT PREEMPTION TEST, INCLUDING AT LEAST IMPLICITLY THE ONLY REPORTED STATE OF MICHIGAN CASE THAT PETITIONER PRO PER IS AWARE OF.

Too many state holdings favoring Petitioner exist to even list here. The "lead" state holdings, however, follow.

MICHIGAN Field Enterprises v. Dept of Treasury, ___ Mich App ___, 457 NW2d 113 (CA Mich 1990) recognizes licenses as NOT preempted under Copyright implicitly.

CALIFORNIA Perhaps the single best state holding, Balboa Ins Co v. Trans Global Equities, op cit, 267 Cal Rptr 787 (CA 3rd 1990) noting state contract, relational, and various marketing claims, generally termed unfair trade practices claims, are NOT preempted, citing cases, and qualifying Del Madera Properties v. Rhodes And Gardner, Inc, 820 F2d 973 (9th 1987). Worth v. Worth, 195 Cal App 3rd 768, 26,208 1988 CLD 21,524, 21,528 (CA CALIF 1ST 1987) holds community property laws not subject to preemption.

WISCONSIN M Bryce & Assoc, Inc v. Gladstone, 107 Wisc2d 241, 319 NW2d 907, 916-919 (CA WISC 1982), cert den, 459 US 944, 103 S Ct 258, 74 L Ed2d 201 (1982) holds

trade secrets law NOT preempted by U.S. Copyright law.

NEW YORK H_2O Swimwear, Ltd v. Lomas, 560 NYS2d 19 (SC NY APP DIV 1ST 1990) is a fair summary of New York law on a range of relational/marketing claims NOT subject to preemption.

FLORIDA Garrido v. Burger King Corp, 558 So2d 79 (CA FLA 3RD 1990) summarizes state law NON-preempted claims. See also, Van Dusen v. Southeast First National Bank Of Miami, 25,853 1985 CLD 19,890, 19,896-19,899 (CA FLA, 1985).

REASON # 17

--MINIMUMLY, THIS COURT OUGHT TO EXERCISE ITS SUPERVISORY POWERS TO REMEDIALLY CORRECT THE PLAIN FACTUAL AND LEGAL ERRORS REGARDING THE U.S. COPYRIGHT ACT 17 USC 301 PREEMPTION TEST MANIFEST IN THE MICHIGAN STATE COURTS' HOLDING

BELOW, AS ENNUMERATED BRIEFLY WITHIN.

A proper, narrow bases for remedial reversal rests on the below "facts".

1) A plainly false, sua sponte trial court FABRICATED fact lies at the core of the lower courts' misconstruction of the 9 state claims: the finding that in 1980 the University of Michigan Press published as a BOOK the still unpublished Anton with Cawley TXu 333-410 copyright, with proper junior co-authorship credit line given Petitioner Cawley. THIS IS FALSE. Remove this fictitious premise (Appendix, 9-15-87 Opinion, at 1-5, 14;A-17-27, 48) and the whole logic of the lower courts' 301(a) disposition fails, and non-preemption is clear.

2) Beyond the improper 301(a) holding noted in Reasons 1-16, tainted 7-2 claim statement secondary holding issued below via wrong usage of other Act provisions.

CONCLUSION

For the foregoing 17 reasons, the Petitioner pro per respectfully prays that a Writ Of Certiorari issue in this case.

A PRO PER'S RELIEF REQUEST

Since this is a pro per petition and all litigation costs scarce resources of time, expertise and money, and this Court always possesses more issues meriting resolution than its docket allows, the pro per Petitioner respectfully further notes two (2) points.

POINT # 1: A Writ ought to issue in this case, accompanied by a per curiam reversal on the nine 17 USC 301(a) preemption holdings, with all other matters being vacated and remanded to the Michigan state courts for reconsideration in light of the 301(a) rever-

sal. The present petition papers, plus the "matured" appellate papers of the parties (which contain specific record references) in the record below (which this Court can call up) ought to permit just, economical, efficient resolution of this appeal.

POINT # 2: Expressly reserving any and all appellate rights in independent federal action 87-70017-DT;90-1981, now before the 6th Circuit Court of Appeals on completed briefing, Petitioner pro per trusts to this Court's discretion whether it wishes to simultaneously resolve the two cases since this case is one basis for the other decision.

Respectfully submitted,

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